

Before the
MAHARASHTRA ELECTRICITY REGULATORY COMMISSION
World Trade Centre, Centre No.1, 13th floor, Cuffe Parade, Mumbai 400 005.
Tel. No. 022 22163964/65/69 – Fax 022 22163976
E-mail mercindia@mercindia.com
Website: www.Mercindia.com

CASE No. 57 of 2003

In the matter of
Alleged breach of permission granted to M/s. Bhushan Steel & Strips Ltd. for captive generation and related matters.

Shri P. Subrahmanyam, Chairman
Shri Jayant Deo, Member
Dr Pramod Deo, Member

ORDER

Dated: 3rd August, 2004

Under their Petition dated 22nd January, 2004 with M/s. Bhushan Steel & Strips Ltd. (BSSL), M/s. Vipras Castings Ltd. (VCL) and Directorate of Industries (DI), Government of Maharashtra (GoM) as Respondents No. 1, 2 and 3 respectively, the Maharashtra State Electricity Board (MSEB) have prayed that the Commission:

- "a) declare that a captive generating plant is not entitled to sell power to third party in the absence of a valid licence as provided under Sections 12 to 15 of the Electricity Act, 2003.
- b) direct the Respondent No. 1 herein to forthwith stop selling electricity to the Respondent No. 2 herein or to in any manner whatsoever engage in distribution, transmission or trading of electricity without an appropriate licence under the provisions of the Electricity Act, 2003.
- c) restrain the Respondent No. 2 herein from receiving any power from any other party without clearing the arrears of electricity charges due to the Applicant herein.
- d) take appropriate action against the Respondent Nos. 1 and 2 herein under the provisions of Section 142 of the Electricity Act, 2003 and impose such penalties on them as this Commission thinks fit and proper.
- e) order and direct the Respondent No. 1 herein to pay to the Applicants a sum of Rs. 10 lacs per month towards the loses incurred by the Applicants on account of the illegal supply of powers by the Respondent No. 1 to Respondent No. 2 herein.
- f) that pending the hearing and final disposal of the present application, the Respondent Nos. 1 be restrained by an order and injunction of this Commission from supplying or selling any power to any third party including the Respondent No. 2 herein.
- g) interim and ad-interim reliefs in terms of prayer (f) above,
- h) for costs and
- i) for such other and further reliefs as the nature and circumstances of the case may require."

2. The Petition states that in January 2001, BSSL had applied for an electric connection of 5 MW for a plant being set up to manufacture cold rolled steel sheets at Village Nifan, Taluka Khalapur, Dist. Raigad, Maharashtra with a connected load of 33 MW and maximum demand of 17 MW. They had stated that they would be setting up two 12 MW DG sets for which they had applied to the GoM for permission for installation, and sought permission to run the DG sets synchronized with the system. After correspondence, MSEB communicated the estimate of work required to be carried out for setting up connection under letter dated 18th October, 2002.

3. The Petition states that, after correspondence and meetings, MSEB granted consent under Section 44 of the Electricity (Supply) Act, 1948 to BSSL to establish a 2x12 MW captive power plant on certain terms and conditions under letter dated 13th September, 2001. The conditions provided inter alia that the Captive Power Plant (CPP) would be for 100% self-use only, that BSSL would avail of 5 MW power from MSEB, that surplus power could not be sold to any third party or to MSEB, and that BSSL would not connect any additional load other than the load sanctioned by GoM/ MSEB on the generating sets. BSSL thereafter established and commissioned the CPP in September, 2003.

4. The Petition states that, by letter dated 22nd July, 2003 to the Commission, BSSL mentioned that their present requirement was only 7 MW against the installed capacity of 24 MW, and that they had surplus power of 17 MW. BSSL stated that they wanted to sell 7 MW power to nearby units using their own transmission lines without using MSEB's infrastructure. BSSL contended that, as per their understanding of the Electricity Act (EA), 2003, generation and sale of power does not require any licence/ NOC except approval of installation by the Electrical Engineer. The Petition states that the Commission replied on 28th July, 2003, inter alia, as follows:

- i) The Commission is a regulatory authority which does not give advice regarding interpretation of EA, 2003.
- ii) Subject to the above observation, it was of the prima facie view that no licence/ No Objection Certificate was required under EA, 2003 for selling surplus power from a captive plant to a third party through own transmission lines.
- iii) BSSL and MSEB may consider filing a joint Petition for deciding the issue.

According to the Petition, it is significant that, in the letter, no judicial decision was taken by this Commission or any advice given to BSSL. Only a prima facie opinion was expressed with a suggestion that BSSL file a joint Petition for a decision on the issue.

5. According to the Petition, inspite of the line of action suggested by the Commission, BSSL wrote to MSEB on 13th October, 2003 that, under the statute, no permission was required to sell power through their dedicated transmission lines to any private party, and relied on the opinion expressed by the Commission. The Petition contends that BSSL deliberately mis-interpreted the Commission's letter dated 28th July, 2003 and that they had, in breach of the advice given in that letter, unilaterally started selling power to VCL without the permission of the Commission or of any competent authority, and have also violated GoM's policy dated 14th March, 2001. Stating some of these contentions, MSEB took objection by their letter dated 14th October, 2003 to BSSL's action, and pointed out that it was contrary to the terms and conditions of the CPP consent and also the provisions of EA, 2003. BSSL were given notice to disconnect the supply extended to VCL.

6. According to the Petition, in their reply dated 18th October, 2003, BSSL cited the Commission's letter dated 28th July, 2003. BSSL also stated that they were using a dedicated transmission line for which plans had been approved by the Electrical Inspector, considering Section 68 of EA, 2003. BSSL admitted that they had not yet connected or synchronized the CPP with the MSEB grid. They also assured MSEB that, in case third party sale was not permitted under EA, 2003, they

would disconnect supply to VCL. After further correspondence, BSSL also forwarded a letter dated 16th November, 2003 from the D.I., GoM to the effect that no licence/ NOC was required for sale of surplus power.

7. The Petition contends that BSSL's action are illegal and bad in law on the following amongst other grounds:

- a) BSSL have acted in breach of the CPP consent granted by MSEB on 21st September, 2001, which stipulated certain conditions which are valid, subsisting and binding. Under these terms, the CPP was only for self-use, power could not be sold to third parties, and the connected load could not be increased. The terms and conditions of the consent are not inconsistent with the provisions of EA, 2003 and, therefore, continue to be in force.
- b) BSSL have acted in breach of Sections 12 to 15 of EA, 2003 inasmuch as they do not have a licence to transmit, distribute or trade in electricity, or to use the electricity generated in their CPP otherwise than for their own use.
- c) BSSL have deliberately mis-construed the prima facie opinion given by the Commission under its letter dated 28th July, 2003, which had requested them to file a Petition before selling power to third parties.
- d) Even the prima facie opinion given by the Commission in its above letter (and also by D.I.) is erroneous. It does not take into account Sections 12 to 15 of EA, 2003. Under Section 9, a person can set up a CPP and dedicated transmission line only for his own use. When a CPP holder wants to sell power to a third party, a specific licence is required.
- e) In fact, BSSL are not even operating a CPP as defined in Section 2(8) of EA, 2003 inasmuch as they have set up a 24 MW plant and use only 7 MW themselves while selling 7 MW to others. Therefore, the plant has not been set up primarily for self-use and does not fall within the definition of captive generation. BSSL would, therefore, be a generating company and be entitled to sell power only to licensees.
- f) BSSL are required to conform to Section 73(b) of EA, 2003 (under which the technical standards for construction of electrical plant, lines and connectivity to the grid are to be specified by the CEA), which they have not done. Therefore, they are not entitled to sell power even to other licensees. Moreover, under GoM's policy dated 20th December, 1997, BSSL could sell only 25% of their CPP power to a third party.
- g) BSSL have not obtained the permission of the appropriate Govt. to establish overhead lines under Section 68.
- h) By directives dated 20th December, 1997, GoM had prohibited various parties from poaching each other's consumers. These directives continue to be in force until modified by the Commission, as per the provisions of EA, 2003.
- i) VCL (to whom BSSL are selling power) are in default of payment to MSEB of more than Rs 13 crores, and are one of their 100 largest defaulters. VCL are also seeking shelter under the provisions of the Sick Industrial Companies Act. Such conduct on the part of any consumer, CPP, etc., ought not to be permitted by the Commission as it could lead to unfair competition, encourage fraudulent behaviour and a break down in the State's generation and distribution system.
- j) In the absence of appropriate regulations and standards being framed, BSSL are not entitled to sell power to VCL. In fact, it is MSEB's understanding that, in a case involving Tata Power Company (TPC) and BSES Ltd., the Commission has prohibited TPC from selling power to various third party consumers till finalisation of appropriate regulations.

8. In their joint reply dated 10th March, 2004, BSSL and VCL have stated as follows:

- a) Both parties are situated in a rural area as notified by GoM and BSSL are, therefore, exempted from obtaining any licence for generation and/or distribution of electricity under the penultimate proviso to Section 14 of EA, 2003. In support, copies of certificates dated 3rd October, 2003 issued by the Collector, Raigad Dist. confirming their location in a notified rural area have been enclosed.
- b) VCL are a sick industrial undertaking and the matter of repayment of their dues is pending with the Board for Industrial and Financial Reconstruction (BIFR), and would be decided by the B.I.F.R. once the rehabilitation scheme is sanctioned.
- c) BSSL's CPP was commissioned in September, 2003, after EA, 2003 came into force. Thus, it has been established in pursuance of that statute under which no permission is required from MSEB, i.e. it has not been established as per the consent given by MSEB in 2001. Therefore, the conditions of that consent also do not apply. Clause II of the consent dated 13th September, 2001 also states that:

"The GOI/ GOM/ MSEB/ MERC policy in respect of Captive Generation in existence as may be revised from time to time will be binding on you."

- d) The Electricity (Supply) Act under which the consent was granted in September, 2001 has been repealed by Section 185 of the EA, 2003. Section 185(2) provides that any licence granted under the repealed Act is deemed to have been granted under EA, 2003. Thus, the consent amounts to a licence granted under Section 14 of EA, 2003, and the penultimate proviso to Section 14 exempts licensing requirements in rural areas. The conditions imposed in the licence thus obtained under the Electricity (Supply) Act for the electricity generated is not valid after the EA, 2003 came into force.
- e) Under its letter dated 22nd July, 2003, the Commission has also opined that no licence/ NOC is required for sale of surplus power from BSSL's CPP to a third party through their own transmission lines. However, the question of whether the third party purchaser would be liable to pay an additional surcharge on charges of wheeling was kept open and the filing of a joint Petition to decide this issue was recommended. The Commission's view, even if prima-facie, has the weight of a decision.
- f) Section 42(2) empowers the Commission to determine the surcharge on the charges of wheeling where it permits consumers to receive supply from a person other than the concerned distribution licensee through open access. In this case, neither are BSSL using MSEB's network nor are VCL any longer MSEB's consumer. Thus, no wheeling charges are payable to MSEB, nor is a surcharge leviable under Section 42(2), and nor is an additional surcharge on the charges of wheeling attracted under Section 42(4) to meet the fixed cost of the distribution licensee arising out of its obligation to supply. Moreover, both the Commission and GoM through D.I. have informed BSSL that no licence/ NOC is required from GoM/ MSEB or the Commission for sale of surplus power through their own transmission line. In any event, the advice given by the Commission under its letter dated 28th July, 2003 needs to be seen as having been given in exercise of its inherent power under Section 42(4) to permit a consumer to receive supply from a person other than a distribution licensee. In view of the fact that no wheeling charges are attracted and, therefore, no additional surcharge on such wheeling charges is leviable, no joint Petition has been filed, but BSSL and VCL are prepared to do so, if directed.
- g) Section 73(b) of EA, 2003 is not attracted since neither the dedicated transmission line nor the CPP are connected to MSEB's grid. Therefore, the technical standards as may be specified by the CEA would not be binding. Moreover, since BSSL are supplying electricity to VCL through a dedicated transmission line of 11 KV and to a single

consumer, no Govt. permission is necessary as per Section 68(2). However, the parties have got their electrical installations approved by the concerned Electrical Inspector.

- h) With regard to MSEB's reference to GoM's directive regarding poaching of each other's consumers, the reply states that the main business of BSSL is manufacture of various steel products and not sale or distribution of power. BSSL are only selling surplus power and EA, 2003 does not prohibit such sale.
- i) The installed capacity of BSSL's CPP is 24 MW. They are presently using 14 MW themselves and selling only 5 MW to VCL. Thus, there is a sale of only a smaller quantum of surplus power, and to only one third party. GoM's directive dated 20th December, 1997 stands superceded by the coming into force of the EA, 2003. MSEB's Circular dated 28th October, 2003 also permits sale of surplus power by CPPs to third parties.
- j) MSEB's Petition is not maintainable, being outside the purview of Section 86 setting out the functions of the Commission.

9. In their reply dated 19th March, 2004, D.I., GoM have stated that a reference had been received from BSSL and another company seeking guidance regarding whether a CPP can sell surplus power through own transmission lines and whether any NOC/ licence is needed from GoM or the Commission. As per D.I.'s practice, references received for guidance from industrial units are referred to the concerned authorities, whose views are then conveyed to them. Accordingly, D.I. sought guidance from the Commission and the Energy Dept, GoM. Based on their response, a reply was given to BSSL under letter dated 9th December, 2003 in good faith.

10. The matter was heard on 30th April, 2004. Shri Gaurav Joshi, Counsel for MSEB, recapitulated the contents of the Petition. He submitted that the plant installed by BSSL was not a CPP as the electricity generated from it was not primarily used by BSSL. Counsel submitted that, apart from complying with the other provisions governing a CPP, a minimum of 51% of the electricity generated (and, according to a Government Circular, 75% of the electricity generated) should be used by the CPP consent holder. He relied on the dictionary meaning of the word 'primarily' (in the definition in EA, 2003), i.e. 'for the most part', 'mainly'.

11. Counsel for MSEB contended that Section 9 of the EA, 2003 did not give power to sell/distribute electricity to a party other than itself. Counsel stated that there is not a single section in the EA, 2003 under which a CPP can distribute power without a licence. He submitted that, to distribute power, a CPP required a licence under Section 12. Counsel for MSEB submitted that the opening words "Notwithstanding anything contained in this Act" of Section 9 give an overriding power to that Section. He contended, however, that this overriding power was given in respect of constructing, maintaining or operating a CPP and dedicated transmission lines. He contended that, in the event that any provision of the EA, 2003 required a person to obtain permission for constructing a generating plant, that would not be necessary if it were a CPP, but Section 9 did not give any right to sell power to a party other than itself. To the Commission's observation that an association of persons could distribute power among themselves, Counsel for MSEB submitted that they could do so if there was such an association and they had dedicated transmission lines, but the Respondent Nos. 1 and 2 had not taken this plea.

12. Counsel for MSEB also contended that the 1st proviso to Section 9(1) stated that the supply of electricity from a CPP through the grid needs to be regulated because, under Section 7, it has to maintain certain technical standards or else the grid would collapse or face other problems. He submitted that Section 9(2) also neither permitted nor prohibited third party sale, but Section 12 contained such a prohibition. Section 12 requires a licence to transmit, distribute or undertake trading in electricity under Section 14, unless exempted under Section 13. Section 13 did not to apply in this case, as no exemption notification had been issued by the Commission as required under that Section.

13. With regard to the Respondents' contention in their Reply that the matter fell under the penultimate proviso to Section 14, namely that *"where a person intends to generate and distribute electricity in a rural area to be notified by the State Government, such person shall not require any licence for such generation and distribution of electricity, but he shall comply with the measures which may be specified by the Authority under Section 53"*, MSEB Counsel submitted that it applies to a rural area which has been notified as such by GoM under EA, 2003. The area where the CPP was situated was not such a notified rural area.

14. The Commission inquired if it had the power to permit third party sale of electricity from a cogeneration plant under Section 86(1)(e). Counsel for MSEB contended that the Commission had the power to promote cogeneration by laying down certain guidelines, policies, regulations etc. The Commission could even lay down guidelines for CPPs. It was not MSEB's contention that there is a blanket prohibition to sell power generated from a CPP to a third party. Licence under Section 12 of the EA, 2003 could be sought, or the power could be supplied to the grid as per the policy of the Commission.

15. The Commission observed that the CPP power might also be supplied to non-consumers. Counsel for MSEB stated that this could not be so, as a consumer was any person who purchased electricity and need not necessarily be a consumer of MSEB. The Commission observed that there could be persons who do not fit within the definition of the word 'consumer' and in such an event, no permission may be required under Section 42(4). However, Counsel for MSEB contended that any person who purchased electricity was a consumer. The moment a person sells electricity to a person other than itself, it is a sale to the public, and that public did not necessarily mean a large number of people.

16. Counsel for MSEB submitted that his case was that BSSL's plant was not a CPP because it is not for the primary purpose of their own use. Secondly, even if it were a CPP, no sale of electricity to third parties was permitted, and a licence to sell electricity was required under Section 12. The Commission observed that the word 'sell' was not used in Section 12, and that it was possible that the function of supply was different from the function of distribution. Counsel for MSEB attempted to bring out the similarity of the words 'distribute' and 'sell'. He relied on the definition of the word 'supply', and stated that the terms 'supply' and 'distribute' meant the same thing since the word 'distribution' was not defined in the EA, 2003. Citing Section 6, he contended that the words 'supply' and 'distribution' are often used interchangeably, and that they are not disjoint but overlapping in nature.

17. Counsel for MSEB then drew attention to GoM's policy dated December 20, 1997 wherein only 25% sale to third party was permitted. He contended that this policy was applicable under Section 185(2)(a) of the EA, 2003. If such a policy were inconsistent with the EA, 2003, then the Act would prevail. However, if there was no inconsistency, then it would continue until the Commission comes out with a different policy.

18. Counsel for MSEB stated that the permission granted under Section 44 of the Electricity (Supply) Act, 1948 stipulates that BSSL cannot sell to third parties. That condition is not inconsistent with the provisions of the EA, 2003 and hence continues to apply. Since there is no express provision under EA, 2003 permitting a CPP to sell to a third party unless a licence or permission is taken, BSSL cannot sell to a third party. Counsel for MSEB submitted further that, even for setting up dedicated transmission lines, permission is required from the appropriate Government under Section 68. Even though BSSL claimed that they had obtained permission from the Electrical Inspector, the latter was not the "appropriate Government" under the EA, 2003. This argument was supported by referring to

Section 162(2), wherein an appeal from a decision of the Electrical Inspector lies to the appropriate Government.

19. Counsel for MSEB submitted that, therefore, MSEB had a cause of action arising from the fact that BSSL are supplying electricity without any permission, and are also supplying to a person who is a defaulter and, urged the Commission to frame guidelines to regulate this kind of practice.

20. Counsel for MSEB referred to Section 68 (2)(a) and (b) of the EA, 2003. He stated that (b) did not apply because the line was outside BSSL's premises and going to a third party. With respect to (a), the Commission observed that in the event the line was not exceeding 11 KV, no permission seems to be required.

21. Shri O.J. Menezes, Counsel for Respondents Nos. 1 and 2, submitted that the letter dated September 13, 2001 addressed by MSEB to BSSL granting permission to install the CPP, stated, inter alia, that the 'GO/GOM/MSEB/MERC policy in respect of Captive Generation in existence as may be revised from time to time will be binding on you'. He submitted that, hence, it was subject to whatever policy or whatever Act came into force after the year 2001. Counsel also relied on the letter dated October 18, 2003 addressed by MSEB to BSSL which stated inter alia, that 'the terms and conditions imposed by this office vide letter No.34292 dated September 13, 2001 are binding on you'.

22. Counsel for Respondent Nos. 1 and 2 stated that the plant was commissioned in September, 2003, after the EA, 2003 came into force. He referred to the certificates issued by the Collector, Raigad to the Respondents stating that they are both situated in a rural area as notified by GoM. Relying on these certificates, Counsel claimed exemption under the provisions of Section 14 (penultimate proviso).

23. Counsel for Respondent Nos. 1 and 2 then referred to the letter dated July 22, 2003 addressed by BSSL to the Commission, wherein they had described their activities as a steel unit engaged in manufacturing of cold rolled sheets, pipes, galvanized sheets etc. Counsel submitted that the primary function of BSSL is the manufacture of steel products and not the sale or distribution of electricity. What was being sold to VCL was only a part of the surplus power of the CPP and not even the entire surplus power. He reiterated that BSSL are not in the business of selling electricity, and there is no person other than VCL purchasing power from them.

24. Counsel for Respondent Nos. 1 and 2 contended from a plain reading of the Commission's letter dated 28th July, 2003 to BSSL, that the joint Petition that was required to be filed was only for determination of additional surcharge under Section 42(4), and not regarding whether BSSL could supply electricity to VCL.

25. Counsel stated that, by letter dated October 13, 2003, BSSL had informed MSEB of their decision to sell power to a private party. MSEB replied (vide letter of October 14, 2003) saying that BSSL had done it 'without our knowledge'. Counsel hence submitted that BSSL had informed MSEB.

26. Referring to the reply dated October 18, 2003 addressed by BSSL to MSEB, Counsel for Respondent Nos. 1 and 2 stated that the exemption contained in Section 68(2)(a) of the EA, 2003 would apply to the instant case as the line did not exceed 11 KV and the supply is to a single consumer, i.e. VCL.

27. Counsel for the Respondent Nos. 1 and 2 pointed out that the letter dated November 24, 2003 from the DI, GoM to BSSL stated that "under the EA, 2003, no NOC/ License from MERC/ MSEB and/ or Government of Maharashtra is required to sale surplus power from your CPP through your own dedicated transmission lines. This issues with the confirmation from MERC, Energy Department,

Government of Maharashtra." He stated that it was only after that BSSL obtained an opinion from the Commission and from GoM (D.I.) that they started supplying electricity to VCL, and submitted that, hence, the doctrine of promissory estoppel applied. Counsel contended that, once it having been held that no permission for sale of power is required and some person acts on such opinion, then the doctrine of promissory estoppel is directly applicable as held in the latest judgement of the Supreme Court in 2003 ((2) SCC page 355), a copy of which could be furnished.

28. Counsel for Respondent Nos 1 and 2 referred to MSEB's Circular dated October 28, 2003 which provided that, in case of sale to third parties, approval of the Commission was required only for banking and wheeling agreements and that the Circular was valid upto December 16, 2004, superceding the other referred Circulars. Hence, MSEB, by their own issuance had stated that sale of power was permitted.

29. Counsel for Respondent Nos 1 and 2 submitted that, under the EA, 2003, any licence or permission granted under the old Act would be deemed to be a licence under the EA, 2003. He relied on Section 185(2). He stated, however, that the restriction on supply of electricity from the CPP imposed by MSEB in their letter of September 13, 2001 was not consistent with EA, 2003 and, hence, MSEB could not contend that there was a breach of this condition after the EA, 2003 came into force.

30. Counsel for Respondent Nos 1 and 2 also referred to Section 142, and submitted that it was not applicable to the present case. Counsel for MSEB, however, contended that Section 142 applied as it also dealt with violation of the EA, 2003 and, according to MSEB, there had been such a violation.

31. Counsel for Respondent Nos 1 and 2 submitted that he had dealt with the issues arising in respect of Section 68 insofar as the line was not exceeding 11 KV. In respect of Section 73(b), Counsel submitted that he was not aware of any technical standards that had been prescribed.

32. Counsel for Respondent Nos 1 and 2 then submitted his contentions on the issue of VCL being a sick company and in arrears of payment to MSEB. He stated that the matter was pending before the BIFR. The Operating Agency, namely ICICI, were willing to consider payment of the amounts due to MSEB over a 5-year period in the draft rehabilitation scheme. Shri Pranay Goradia, representative of VCL, added that VCL had a mini-steel plant whose business was suffering because of the general downtrend in the steel industry, and that they had approached MSEB to implement the guidelines issued by GoM in respect of reliefs and concessions to sick industries. According to him, MSEB had contended that those guidelines were applicable only once the rehabilitation scheme was sanctioned, a contention which even the BIFR finds untenable, and wanted the amounts to be paid within a year. Shri Goradia stated that VCL were willing to pay MSEB the dues owed as per the guidelines. To a query from the Commission, Counsel for the Respondents submitted that VCL's case was covered by the High Court (Nagpur Bench) case regarding MSEB's top 100 defaulters.

33. In response, Counsel for MSEB submitted that the contention that the joint Petition referred to in the Commission's letter dated 23rd July, 2003 was required to be filed only to determine additional surcharge, etc. was incorrect. The letter clearly mentioned that the joint Petition needed to be filed to determine the issues raised in the letter dated July 22, 2003 from BSSL, and further contended that the Commission had not given any permission vide its letter. Counsel also submitted that the contention that the doctrine of promissory estoppel applied was incorrect. Firstly, no authority had given a promise (the Commission's or DI's letters could not be held to be a promise) and, secondly, there can be no promissory estoppel against statute if the law prohibits something.

34. With respect to MSEB's Circular dated October 28, 2003, Counsel for MSEB pointed out that it had been stayed by the Commission. Apart from that, there were several other conditions mentioned in the Circular which the Respondent Nos 1 and 2 have not complied with. Counsel drew attention to the fact that, as per the Circular, MSEB's permission was required for distribution lines and connecting lines, which permission the Respondents have contended that they do not need.

35. Counsel for MSEB also refuted the contention that the Petition was not maintainable under Section 86. He relied on Section 142, and submitted that it applied to even a breach of the provisions of the EA, 2003. Counsel concluded that the Commission could entertain MSEB's complaint and give a ruling.

36. At the hearing, the Commission directed that the Petitioner and Respondent Nos. 1 and 2 furnish written submissions of their respective contentions. As directed, MSEB filed their written submission on 17th May, 2004, essentially reiterating the contents of their Petition and oral arguments during the hearing. In the context of their contention that BSSL cannot, in the absence of a licence under Section 14, transmit or distribute electricity generated in their CPP otherwise than for their own use, MSEB have submitted that the term "Distribute" has not been defined under the EA, 2003. It should therefore be construed in accordance with its plain dictionary meaning. The Concise Oxford English Dictionary defines 'distribute' as under:

- "i) Hand or share out to a number of recipients.
- ii) (be distributed) be spread over an area.
- iii) Supply (goods) to retailers".

MSEB have submitted that it is thus clear that the word "distribute" includes "supply" to consumers. Therefore, no person can supply any electricity to any consumer or any other person without a licence as required under Sections 12 to 15.

37. In their written submission, MSEB have also pointed out that no notification has been issued by GoM declaring any area to be rural area under EA, 2003. Therefore, no exemption from obtaining a licence under Section 14 can be claimed by BSSL on this ground. Their reliance on the certificate issued by the Collector, Raigad is mis-conceived as it did not refer to any notification under EA, 2003. In fact, GoM have set up a Committee to look into the matter of notification of rural areas under EA, 2003. Thus, where a CPP holder wants to sell power to a third party, a specific licence is required.

38. MSEB have pointed out that, in its letter dated 28th July, 2003, the Commission had clearly stated that it does not advise, and requested BSSL to file a Petition before selling power to third parties. BSSL have sought to restrict these directives to the filing of a joint Petition on the issue of payment of additional surcharge and wheeling charges under Section 42(4). BSSL have also ignored the terms 'prima facie' used by the Commission. The issue before the Commission in the present matter concerns the entitlement of the CPP to sell power to third parties, and not the issue of wheeling charges or surcharge which would be dealt with at a later point if required. This is apart from MSEB's contention that the prima facie opinion expressed by the Commission in its letter and by D.I. is incorrect and erroneous since it does not take into consideration Sections 12 to 15 read with Section 9.

39. In their written submission, MSEB have stated that a plain reading of Section 9 indicates that no licence is required when a CPP and dedicated transmission lines are to be set up for own use. However, Section 9 does not expressly or implicitly permit supply to third parties without a licence under Section 12. In fact, it provides that where a CPP seeks to supply electricity through the grid, it has to be regulated in the same manner as a generating station of a generating company. MSEB have reiterated that, in any event, the generating station set up by BSSL is not a CPP as defined in Section

2(8) since it is not generating electricity primarily for their own use. BSSL would, therefore, be a generating company and would, thus be entitled to sell power only to other licensees in the absence of a specific licence. From the dictionary meaning of the word "primarily" used in the definition of CPP in EA, 2003, atleast 51% of the electricity generated should be for own use. In fact, as stated in the Petition, under GoM's policy dated 28th December, 1997, BSSL can sell only 25% of the electricity generated to third parties provided it has the necessary licence to do so. This policy of GoM continues in view of Section 185(2) until modified by the Commission.

40. Responding to the contentions of BSSL and VCL, MSEB have pointed out that the Departmental Circular dated 28th October, 2003 cited by them as allowing third party sale has been stayed by the Commission. Further, they cannot pick and choose. If they claim that they are entitled to sell power to third parties in accordance with Circular, then they are bound by all its conditions, which are admittedly not complied with nor has any application been made as required. Reliance cannot be placed on the clarification issued by the D.I. since it has no power to issue such a clarification, and it is also clear that it was based on the prima facie opinion expressed by the Commission. The claim of promissory estoppel also does not apply since no promise was made other than the consent dated 21st September, 2001, the conditions of which in any case BSSL do not want to comply with. The prima facie opinion expressed by the Commission in its letter dated 28th July, 2003 cannot also be construed as a promise. In any event, there can be no estoppel against the statute, particularly as it relates to the mandatory provisions of Sections 12 to 15.

41. As far as maintainability of the Petition is concerned, MSEB have again cited Section 142 of EA, 2003 as it is their case that the Respondent Nos 1 and 2 have contravened the provisions of EA, 2003, particularly Sections 12 to 15.

42. In their joint written submission dated 13th May, 2004, BSSL and VCL have also essentially reiterated the contentions contained in their earlier written reply and oral arguments during the hearing. They have clarified that, as against the installed CPP capacity of 24 MW, BSSL's requirement at the time when they first approached the Commission was 7 MW only and they had 17 MW spare capacity. BSSL have agreed to sell power to VCL only to the extent of 5 MW. By the time the sale of power commenced, BSSL's own requirement was 10 MW, and they are now using 14 MW for their own requirements with sale of 5 MW to VCL. Thus, most of the online capacity of the CPP is being used by BSSL. Hence, the CPP is primarily for BSSL's own use and complies with the definition under Section 8(2).

43. The written submission of Respondent Nos 1 and 2 further states that MSEB have disconnected power supply to VCL on 8th October, 2003, and, therefore, the latter are no longer a consumer of MSEB. The law prevailing from time to time prescribes powers to the licensee to disconnect a defaulting consumer. Once power supply is disconnected, that person ceases to be a consumer of the licensee. The statute does not envisage temporary disconnection of power supply in case of a defaulting consumer. Even if it is presumed that MSEB had temporarily disconnected the power supply of VCL on 8th October, 2003, it was permanently disconnected by MSEB from 30th April, 2004. The metering equipments, etc. in VCL's premises were removed on 1st May, 2004. MSEB's power supply to BSSL was of a temporary nature (for construction purpose only) and was also disconnected by MSEB on 1st May, 2004 and no permanent power supply has been released to them. Thus, neither BSSL nor VCL are now MSEB's consumers. Any rules that might have been prescribed in respect of installation and commissioning of CPP are, therefore, not binding on either of them.

44. The Respondents' written submission states that VCL are a sick unit as declared by BIFR. It sets out various attempts by VCL to obtain reliefs and payment of arrears in installments from MSEB, and cites GoM's guidelines in this regard. It also mentions the draft rehabilitation scheme prepared by ICICI (the Operating Agency nominated by BIFR), who have worked out a repayment plan, and states that VCL undertake to pay MSEB as per the scheme once it is sanctioned by BIFR. The difficult circumstances in which VCL, as a part of the steel industry, is placed have also been set out. VCL's bankers had also written to MSEB with regard to disconnection of power supply.

45. The Commission notes that, under their letter dated 22nd July, 2003 addressed to the Commission, BSSL had stated that:

"We have installed a captive power plant for 24 MW primarily for our own use. Our total demand is 17 MVA our present contract demand with MSEB is 5700 KW. We are going to retain MSEB connection to the tune of 4.8 MVA for our start up needs. Our present requirements is 7 MW against our installed capacity of 24 MW. We thus initially have surplus power to the extent of 17 MW. We wish to sell 7 MW power to units adjoining/ nearby our plant. We propose to install our own transmission line and would not use any infrastructure of MSEB so as to save on wheeling charges/ transmission losses/ surcharges. We understand that as per the Electricity Act, 2003, generating & selling of power does not require any License/ NOC permission from any agency except approval of installations by Electrical Engineer. However, as we are new to this subject, we would be highly obliged if you can guide us as about the formalities necessary to sell power to such units."

The Commission had replied on 28th July, 2003 stating that:

"The Commission is a regulatory authority, which interprets and decides on matters in accordance with the process prescribed under the relevant law. As such, the Commission does not give advice regarding interpretation of the Electricity Act outside this process."

Subject to the above observations, with regard to your understanding that generating and selling of power from your captive plant through your own transmission line to a third party would not require a license/ NOC or other permission under the Electricity Act, 2003 except for approval of installation, your attention is drawn to Section 9(1) of the EA-2003 which states that:

"Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines." The term "dedicated transmission lines" is defined in Section 2(16) as:

"any electric supply-line for point to point transmission which are required for the purpose of connecting electric lines or electric plants of a captive generating plant referred to in Section 9 or generation station referred to in Section 10 to any transmission lines or sub-stations or generating stations, or the load center, as the case may be." Thus, it seems prima facie that no license or NOC is required under the Act for selling surplus power from your captive plant to a third party through your own transmission lines. However, the third party buyer may be required to pay an additional surcharge on the charges of wheeling under Section 42(4). Hence both of you may consider filing a joint petition to decide this issue.

46. The onus of acting in accordance with the provisions of law is on the concerned parties, and the Commission had made it clear that, where relevant and required, the Commission could be approached formally in accordance with the established procedure. With regard to the observations and views expressed by the Commission in its letter, the wording of the response makes it clear that these were only the Commission's prima facie views. Thus, the Commission's letter cannot be claimed to be

anything more than that. D.I., GoM through its letter to BSSL, had merely communicated the feedback received from the Commission as a part of its effort to facilitate the interface between industry and the various concerned agencies. Neither letter can even remotely be construed as constituting any kind of promissory estoppel in favour of any of the parties.

47. By their consent dated 13th September, 2001 to BSSL to establish a 24 MW (2x12 MW) CPP at their location in Taluka Khalapur, MSEB had admitted that they could not meet the requirements for withholding such consent under proviso (a)(1) and (2) of Section 44(1) of the then prevailing Electricity (Supply) Act, 1948. As far as the terms and conditions subject to which the consent was granted, MSEB have argued that they are saved by virtue of Section 185(2)(a) of the EA, 2003, which states that:

"anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act."

MSEB have argued that, since these terms and conditions, which include restrictions on third party sale, etc. are not inconsistent with the EA, 2003 and no other dispensation has been framed by the Commission in this regard, they continue to apply. Moreover, MSEB have claimed that there is nothing in EA, 2003 which allows sale of CPP power to third parties without a licence (even though, at various times, MSEB have themselves permitted such third party sale upto a certain extent under their own policies). It may be pointed out in passing that, in its Order dated 13th February, 2004 in Case No. 26 of 2002 (on a Petition filed by Oil and Natural Gas Commission), the Commission has held that at least one such condition, viz. the restriction on reduction in contract demand, was invalid not only under EA, 2003, but also under Sections 44 and 49 of the Electricity (Supply) Act. Certain other policy stipulations imposed by Circulars have also been struck down by the Commission in its Order dated 21st May, 2004 in the cases of M/s. Eurotex and others.

48. The contention of MSEB that, by selling power to a third party, BSSL's plant cannot be considered to be a CPP and that, in any case, such sale cannot be undertaken without a licence unless exempted by the Commission under Section 13 or by virtue of GoM notifying its location as being in a rural area under the penultimate proviso to Section 14, has to be tested against the relevant provisions of EA, 2003. The Commission has not notified any exemption under Section 13. As pointed out by MSEB, no rural area notification has been issued by GoM under the relevant proviso to Section 14 either. The certification by the Collector, Raigad Dist. may be valid for other purposes, but does not refer to any notification under the EA, 2003.

49. Section 2(8) of EA, 2003 defines a captive generating plant as *"a power plant set up by any person to generate electricity primarily for his own use."* MSEB have conceded that the word "primarily" may be construed in its dictionary sense as meaning "mostly" or "mainly" and, as such, self-use to the extent of more than 50% would satisfy this meaning. The Commission is also of the view that a plant may be treated as captive if more than 50% of the power generated is for self-use. It was admittedly established and commissioned in September, 2003, i.e. three months after the EA, 2003 came into force. It has been clarified without rebuttal that BSSL agreed to sell and are selling 5 MW power to VCL. When the sale commenced, BSSL's only requirement was 10 MW, which increased to 14 MW by the time their written submission was filed on 13th May, 2004. The larger quantum of power generated in terms of online as well as total capacity from the plant is, therefore, now being used by BSSL. At the end of the day also, the plant will continue to be treated as a CPP provided more than

12 MW out of their total capacity continues to be used by BSSL for their own requirements. Thus, the plant set up by BSSL is a CPP within the meaning of Section 2(8).

50. MSEB have raised various arguments, set out extensively in the foregoing paragraphs, challenging BSSL's right to sell surplus power from its generating plant, whether treated as captive or otherwise, to any third party under EA, 2003 without a licence or permission to do so. Under Section 9(1)- *"Notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines:*

Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company."

Thus, after 10th June, 2003, no licence is required to set up a CPP and dedicated transmission line. The term "dedicated transmission line" has been defined in Section 2(16). (The proviso is not relevant since electricity is not being supplied through the grid.)

51. As we have seen, in order for it to be treated as a CPP, the electricity generated by the plant has to be primarily for self-use. In other words, the law envisages that a CPP may generate electricity surplus to its holder's requirements. Thus, the concept of provision of surplus power by a CPP to licensees or to others is built into the definition of a CPP. Since the CPP was established and commissioned after the coming into force of EA, 2003, the conditions imposed by MSEB while granting consent in 2001 can survive (under Section 185(2)(a)) only to the extent that they are not inconsistent with the provisions of EA, 2003. Even without the help of the penultimate proviso to Section 14 which provides for exemption from licensing in rural areas, which MSEB have argued and the Commission has held does not come into play, the Commission cannot find anything in the EA, 2003 to prevent a CPP from selling surplus power to any party, particularly in the light of Section 9 (which is an overriding provision) read with the definition in Section 2(8). Thus, the restriction imposed by MSEB while granting consent is also invalid, being inconsistent with EA, 2003 in the circumstances of the present case.

52. As far as the third party purchaser (VCL) is concerned, we turn to Section 42 which deals with the duties of distribution licensees and open access. Section 2(47) defines open access as:

"the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission."

BSSL are admittedly providing power to VCL through their own transmission line and the question of open access is, therefore, not involved. The determination of wheeling charges, phasing of open access and surcharge in addition to the charges of wheeling under Section 42(2) are, therefore, not relevant in this case.

53. Section 42(4) reads as follows:

"Where the State Commission permits a consumer or class of consumers to receive supply of electricity from a person other than the distribution licensee of his area of supply, such consumer shall be liable to pay an additional surcharge on the charges of wheeling, as may be specified by the State Commission, to meet the fixed cost of such distribution licensee arising out of his obligation to supply."

The Commission finds that, in the specific circumstances of the case where BSSL are supplying surplus power from their CPP through their own dedicated transmission line to VCL, the provisions of Section 42(4) are not attracted, and VCL are not required to be permitted or take permission from the Commission to receive electricity supply from BSSL. Having admittedly being permanently disconnected by MSEB, VCL are no longer their consumer. They are also not a consumer as defined in Section 2(15), which reads as follows:

"consumer means any person who is supplied with electricity for his own use by a licensee or the Government or by any other person engaged in the business of supplying electricity to the public under this Act or any other law for the time being in force and includes any person whose premises are for the time being connected for the purpose of receiving electricity with the works of a licensee, the Government or such other person, as the case may be."

BSSL, from whom VCL are receiving electricity, are admittedly not engaged in the business of supplying electricity, nor are BSSL connected with the works of MSEB / GoM or any other licensee. Thus, as stated earlier, VCL are not a consumer. Since Section 42(4) does not apply, and since, in any case, there is no question of wheeling of power by provision of open access, the question of any liability to pay an additional surcharge on the charges of wheeling also does not arise.

54. With regard to the requirement of approval from GoM (the Appropriate Government) for installation of overhead lines, Section 68(2)(a) provides that it does not apply:

"in relation to an electric line which has a nominal voltage not exceeding 11 kilovolts and is used or intended to be used for supplying to a single consumer."

Considering that VCL are not a consumer, it is a moot point whether the above applies. BSSL have also stated that the Electrical Inspector under GoM has approved the installation. If MSEB are aggrieved in this account, it is for them to approach GoM, and it is for GoM to take suitable action or remedy in case Section 68 is violated. With regard to the claim of BSSL that they are not covered under Section 7 with regard to technical standards since they are not connected to the grid, the Commission does not wish to comment since it does not concern the substantive matter before it. However, it draws attention to Section 73(b) which mandates the Central Electricity Authority, inter alia, to *"specify the technical standards for construction of electrical plants"*, and under Section 73(c) to *"specify the safety requirements for construction, operation and maintenance of electrical plants and electric lines."*

55. MSEB have taken objection to the sale of power by BSSL to VCL also on the ground that VCL are a major defaulter, whereas VCL have argued that they are prepared to make payment in accordance with the rehabilitation scheme when it is mandated by BIFR, and have approached MSEB for reliefs before citing certain GoM policies. Neither of these arguments have any bearing on the issues at hand in terms of the statutory provisions. Whether or not BSSL supply power to VCL, it does not impinge on the remedies available to MSEB for recovery of their dues, which was also the case prior to VCL's permanent disconnection.

56. MSEB's reference to an Order of the Commission and GoM policy restricting poaching of consumer seems to be related to the Commission's Order dated 3rd July, 2003 in Case No. 14 of 2002. That reference is of no relevance, since that matter related to a dispute between two licensees over the interpretation of the terms of licences, and the Commission inter-alia restrained one of the licensees from effecting supply to certain categories of consumers on various grounds.

57. In sum, the Commission finds, inter alia, that:

- (a) the plant set up by BSSL fulfils the definition of CPP under EA, 2003.
- (b) after using the CPP power mostly for their own requirements, BSSL can sell the remaining power to third parties using their own dedicated transmission lines without a licence or other permission from the Commission.
- (c) VCL can purchase power from BSSL without any permission from the Commission and without payment of any additional surcharge under Section 42(4).

MSEB's Petition is dismissed with the above observations and findings.

Sd/-
(Jayant Deo)
Member

Sd/-
(Prمود Deo)
Member

Sd/-
(P. Subrahmanyam)
Chairman, MERC

Sd/-
(A.M. Khan)
Secretary, MERC